

STATE OF MICHIGAN
COURT OF APPEALS

In re CTPJ, Minor.

UNPUBLISHED
January 15, 2015

No. 321716
Calhoun Circuit Court
Family Division
LC No. 2013-100089-AD

In re CFC, JR., Minor.

No. 321717
Calhoun Circuit Court
Family Division
LC No. 2013-100090-AD

In re CTPJ, Minor.

No. 321718
Calhoun Circuit Court
Family Division
LC No. 2013-100091-AD

Before: TALBOT, C.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated appeals, petitioner appeals as of right from the circuit court's order denying her motion to review the Michigan Children's Institute (MCI) superintendent's denial of consent to adopt three foster children in her care, and dismissing her petitions. We affirm.

Petitioner had served as the foster care mother of three minor children since August 19, 2011, after the children's birth mother requested agency assistance because she was homeless and did not have the ability to care for and support the children. Services were provided to address the birth parents' reported substance abuse and neglect, but the parental rights of the birth parents to the three children were ultimately terminated. Petitioner sought consent to adopt the three children placed in her foster home. Family Service and Children's Aid, an agency that contracts with the Department of Human Services (DHS), conducted an investigation and issued an addendum recommending that petitioner's requested consent to adopt be denied. Once a child

becomes a ward of the court, the MCI superintendent represents the state as the child's guardian, MCL 400.203(1), has the power to make decisions on behalf of the child, MCL 400.203(2), and is "authorized to consent to the adoption" of a child, and upon adoption, the child ceases to be a ward of the state, MCL 400.209(1). The superintendent conducted an investigation, which included a review of the addendum, and denied petitioner's request for consent to adopt. Petitioner thereafter filed a motion challenging the superintendent's decision on the basis that it was arbitrary and capricious, requested a hearing, and also obtained a temporary restraining order to prevent the children's removal and placement in another identified adoptive home. The superintendent agreed to reconsider his decision and engaged in additional investigation, including an in-home visit with petitioner and the children. Ultimately, the superintendent issued an amended decision that again denied petitioner's requested consent to adopt. The circuit court conducted a § 45 hearing, MCL 710.45, and held that petitioner failed to establish by clear and convincing evidence that the superintendent's decision to withhold consent was arbitrary and capricious.

Petitioner argues on appeal that the superintendent's decision was arbitrary and capricious because it failed to consider the children's individual circumstances and ignored relevant factors that warranted consent to adopt. We conclude that the circuit court did not commit clear legal error when it denied petitioner's motion, because the court did not err in finding that petitioner failed to present clear and convincing evidence that the superintendent's denial of consent to adopt was arbitrary and capricious. Contrary to petitioner's assertion, the superintendent testified that he only delineated certain factors in his decision, which was not required to be exhaustive, and considered the long-term best interests of the children.

"The adoption statutes are written to protect the best interests of the child[.]" *In the Matter of Dixon*, 116 Mich App 763, 773; 323 NW2d 549 (1982). The adoptee child does not have the right to counsel because the child's interests are protected by the state. *Id.* at 772-773. Although the adoption code sets forth procedures and services to safeguard and promote the best interests of the child in need of adoption as well as the rights of all parties concerned, the adoptee's rights take precedent when a conflict arises because the adoptee's rights "shall be paramount." MCL 710.21a(b).

The circuit court's review of the superintendent's decision to withhold consent is limited to whether the petitioner presented clear and convincing evidence that the superintendent's decision was arbitrary and capricious. MCL 710.45(7); *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008). "Whether the family court properly applied this standard is a question of law reviewed for clear legal error." *Id.*

The generally accepted meaning of "arbitrary" is " 'determined by whim or caprice,' " or " 'arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.' " *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984) (internal quotation marks and citations omitted). The generally accepted meaning of "capricious" is "apt to change suddenly; freakish; whimsical; humorsome." *Id.* (internal quotation marks and citations omitted). [*In re Keast*, 278 Mich App at 424-425.]

In *In re Keast*, 278 Mich App at 423, this Court addressed the superintendent's role in adoptions:

The MCI superintendent represents the state of Michigan as guardian of all children committed to the state by a family court after termination of parental rights. MCL 400.203. The superintendent is authorized to consent to the adoption of any child committed to the MCI as a state ward. MCL 400.209. Consent by the superintendent to the adoption of a state ward is required before the family court can approve a prospective adoption. MCL 710.43(1)(b). Under MCL 710.45(2), a person who has filed a petition to adopt a state ward and has not received consent from the MCI may file a motion in family court to challenge the MCI superintendent's denial of consent.

MCL 710.45 provides, in relevant part:

(1) A court shall not allow the filing of a petition to adopt a child if the consent of a representative or court is required by section 43(1)(b), (c), or (d) of this chapter unless the petition is accompanied by the required consent or a motion as provided in subsection (2).

(2) If an adoption petitioner has been unable to obtain the consent required by section 43(1)(b), (c), or (d) of this chapter, the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. . . .

* * *

(7) Unless the petitioner establishes by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall deny the motion described in subsection (2) and dismiss the petition to adopt.

(8) If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall issue a written decision and may terminate the rights of the appropriate court, child placing agency, or department and may enter further orders in accordance with this chapter or section 18 of chapter XIIA as the court considers appropriate. In addition, the court may grant to the petitioner reimbursement for petitioner's costs of preparing, filing, and arguing the motion alleging the withholding of consent was arbitrary and capricious, including a reasonable allowance for attorney fees.

* * *

(10) The court's decision on a motion brought under this section is appealable by right to the court of appeals.

In *In re Cotton*, 208 Mich App 180, 184-185; 526 NW2d 601 (1994), this Court explained the Legislature's intent in limiting judicial review, the deference to the superintendent, and application of the burden of proof as follows:

The fact that the Legislature in drafting the statute limited judicial review to a determination whether consent was withheld arbitrarily and capriciously, and further required that such a finding be based upon clear and convincing evidence, clearly indicates that it did not intend to allow the probate court to decide the adoption issue de novo and substitute its judgment for that of the representative of the agency that must consent to the adoption. Rather, the clear and unambiguous language terms of the statute indicate that the decision of the representative of the agency to withhold consent to an adoption must be upheld unless there is clear and convincing evidence that the representative acted arbitrarily and capriciously. Thus, the focus is not whether the representative made the “correct” decision or whether the probate judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision. Accordingly, the hearing under § 45 is not, as petitioners seem to suggest, an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption.

Because the initial focus is whether the representative acted arbitrarily and capriciously, the focus of such a hearing is not what reasons existed to authorize the adoption, but the reasons given by the representative for withholding the consent to the adoption. That is, if there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual, such as the probate judge, might have decided the matter in favor of the petitioner. Rather, it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the representative was acting in an arbitrary and capricious manner.

The superintendent may rely on the results of an agency investigation and the recommendations of staff members. *Id.* at 186. The fact that a petitioner “may be able to marshal evidence against the conclusions” of the staff is insufficient. *Id.*

Petitioner contends that the superintendent’s decision was arbitrary and capricious because he failed to consider all factors relevant to the best interests of the children. However, the superintendent’s authority is set forth in MCL 400.203. Specifically, the superintendent represents the state as guardian of each child determined to be a court ward and to make decisions on behalf of the child committed to the institute. See MCL 400.203(1) and (2). MCL 400.209 states, in relevant part:

(1) The superintendent of the institute or his or her designee is authorized to consent to the adoption, marriage, guardianship, or emancipation of any child who may have been committed to the institute according to the laws for the adoption, marriage, guardianship On such adoption, marriage, guardianship,

or emancipation, the child so adopted, married, or emancipated . . . shall cease to be a ward of the state.

The statute does not delineate what factors the superintendent must consider in determining whether consent to adoption will be granted. Moreover, the statute does not delineate the form of the consent or denial of consent and the specificity of the factual findings rendered by the superintendent. The fact that the superintendent may have cited other factors in unpublished decisions does not render his decision arbitrary and capricious.

The superintendent testified that he gathered information from DHS workers, the foster care workers, and adoption workers, and held a conference call regarding why adoption was not recommended. This investigation served as the foundation for his decision to deny consent to adopt. After petitioner filed her motion for review and obtained a temporary restraining order preventing the removal of the foster children, the superintendent agreed to reconsider his decision. Consequently, he engaged in additional investigation, which included an in-home visit with petitioner and the children. He agreed that it was unusual to reconsider his decision, but was concerned about the children's removal from an established placement. After gathering additional information, including additional staff interviews, Johnson issued an amended decision denying petitioner's request to adopt. The denial cited petitioner's limited financial resources from disability benefits, petitioner's health issues, and the impact of these issues on the ability to raise the children long-term. Additionally, during the course of his investigation, one of the children indicated his preference to be adopted by the family with which he visited. Although petitioner questioned the investigation and the accuracy of the information in the adoption agency's addendum, the superintendent testified that his own investigation and observations were consistent with the information contained in the addendum.

Petitioner contends that the superintendent's decision was arbitrary and capricious because he failed to consider all relevant factors. As indicated, however, MCL 400.209 does not delineate the form and extent of the superintendent's decision. Furthermore, in his testimony, the superintendent acknowledged his awareness of the information contained in the reports, such as the care of the children in petitioner's home for a 2½-year-period. Nonetheless, the superintendent opined that adoption by petitioner was not in the long-term best interests of the children. The testimony supported the superintendent's decision and reflected that it was not arbitrary and capricious. Petitioner's sole source of income was disability benefits, and she was unable to rely on those benefits alone to support the children; she also depended on foster care subsidies and community contributions. The superintendent acknowledged at the hearing that petitioner's income was currently "adequate." However, he needed to consider the children's long-term interests and needs that would increase over time. Additionally, the superintendent noted that petitioner's weight limited her interaction with the children. During his visit, petitioner sat on the couch and directed the children toward her.

Although petitioner relies on testimony that she offered, which contradicted aspects of the superintendent's testimony, the circuit court did not clearly err in finding that it did not clearly and convincingly demonstrate that the superintendent's decision was arbitrary and capricious. Petitioner initially testified that she played sports with the children without limitation. She later admitted, however, that she could not run, per se, and had to take breaks. She acknowledged that she could not lift things. Finally, petitioner recognized that her primary source of income was

disability income, but failed to recognize that her extensive medical conditions and disability benefits contradicted her claim that there were no limitations on her ability to care and provide for three young children.

We also note that the addendum contained an incident of physical discipline against a fourth, unrelated, foster child placed in petitioner's home. The addendum stated that this child reported the physical discipline and that petitioner denied the incident, but that petitioner's daughter corroborated the incident which then caused petitioner to admit to the discipline. Petitioner testified that the incident was treated as a licensing issue that she promptly corrected, but the addendum concluded that petitioner did not complete the corrective action plan. Additionally, the addendum contained troubling information regarding petitioner's allowance of contact between the children and their birth father that caused regression behaviors, and the insistence that one child be placed on ADHD medication, but teachers reported that it was unnecessary and caused the child to fall asleep in class. Petitioner did not explain the visitation with the birth father at the hearing and contended that the medical reports reflected her concern for the children. However, the circuit court did not give credence to petitioner's testimony or find that it clearly and convincingly demonstrated that the superintendent's decision was arbitrary and capricious.

Petitioner's comparison of her established relationship to that of the prospective adoptive family is inappropriate. The § 45 hearing does not present the opportunity to make a case why consent should have been granted, but rather is the opportunity to address why the superintendent acted arbitrarily and capriciously in withholding that consent. *In re Cotton*, 208 Mich App at 184-185.

Petitioner also argues that the superintendent's decision was arbitrary and capricious because the superintendent vacillated in his consideration of the factors to support his decision. We disagree. Contrary to what petitioner asserts, the superintendent did not vacillate in his citation and construction of the factors he considered with regard to the adoption decision. Rather, he acknowledged that petitioner was currently able to provide for the children's needs and that her health did not currently impact the care of the children. However, his decision considered the long-term care of the children, noting that the children's needs would require additional resources and that petitioner was on a fixed income because of disability. The superintendent acknowledged that the children had not been harmed because of petitioner's health issues, but observed first hand that petitioner's ability to interact with them was limited as a result of her health issues, specifically her weight. The record does not reflect vacillation or contradiction, but clarification of the superintendent's position in response to questioning by petitioner's counsel.

Additionally, petitioner contends that the spanking incident was taken out of context because an unrelated foster child "threatened to kill" her, and she responded by merely swatting the child with a foam slipper. Petitioner did not testify regarding the incident, and her assertion that she responded to a threat is not otherwise reflected in the record. Accordingly, this issue as raised by petitioner does not establish that the circuit court erred in upholding the superintendent's denial of consent to adopt.

In light of the testimony presented at the § 45 hearing, the superintendent's investigation, and the information contained in the addendum, the circuit court's decision to uphold the superintendent's decision to deny petitioner's consent to adopt is not clearly erroneous. *In re Keast*, 278 Mich App at 423. The court did not commit clear legal error in ruling that petitioner failed to present clear and convincing evidence that the superintendent's denial of consent to adopt was arbitrary and capricious.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly